

1  
2 UNITED STATES DISTRICT COURT FOR THE  
3 WESTERN DISTRICT OF WASHINGTON  
4 AT SEATTLE

5 CONNIE HARRIS, KRISTI SCOCCO, )  
6 SUSAN SARTAIN, MARY MIHOVILICH, )  
7 DAVID ASUNCION, BRIAN JAEGER, )  
8 JUDY JAEGER, MARY CANTU, )  
9 KRISTEN WEISE, KATRINA JOHNSON, )  
10 CATHERINE CLEMENS, MARK )  
11 MILLER, MARY MIOTKE, DALE )  
12 DOYON, AARON HEINTZMAN, SARA )  
13 MCNAMARA, ERIN BAST, and MARIA )  
14 SAGISI GEISS, as individuals, )

15 *Plaintiffs,* )

16 v. )

17 U.S. BANKCORP, BANK OF AMERICA, )  
18 N.A., & KEYCORP, national banking )  
19 associations, )

20 *Defendants.* )  
21  
22  
23  
24  
25

CASE NO. 2:19-cv-00291-BJR

ORDER GRANTING PLAINTIFFS'  
MOTION FOR LEAVE TO AMEND  
COMPLAINT; GRANTING IN PART  
DEFENDANT KEYCORP'S  
MOTION TO DISMISS

26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94  
95  
96  
97  
98  
99  
100  
101  
102  
103  
104  
105  
106  
107  
108  
109  
110  
111  
112  
113  
114  
115  
116  
117  
118  
119  
120  
121  
122  
123  
124  
125  
126  
127  
128  
129  
130  
131  
132  
133  
134  
135  
136  
137  
138  
139  
140  
141  
142  
143  
144  
145  
146  
147  
148  
149  
150  
151  
152  
153  
154  
155  
156  
157  
158  
159  
160  
161  
162  
163  
164  
165  
166  
167  
168  
169  
170  
171  
172  
173  
174  
175  
176  
177  
178  
179  
180  
181  
182  
183  
184  
185  
186  
187  
188  
189  
190  
191  
192  
193  
194  
195  
196  
197  
198  
199  
200  
201  
202  
203  
204  
205  
206  
207  
208  
209  
210  
211  
212  
213  
214  
215  
216  
217  
218  
219  
220  
221  
222  
223  
224  
225  
226  
227  
228  
229  
230  
231  
232  
233  
234  
235  
236  
237  
238  
239  
240  
241  
242  
243  
244  
245  
246  
247  
248  
249  
250  
251  
252  
253  
254  
255  
256  
257  
258  
259  
260  
261  
262  
263  
264  
265  
266  
267  
268  
269  
270  
271  
272  
273  
274  
275  
276  
277  
278  
279  
280  
281  
282  
283  
284  
285  
286  
287  
288  
289  
290  
291  
292  
293  
294  
295  
296  
297  
298  
299  
300  
301  
302  
303  
304  
305  
306  
307  
308  
309  
310  
311  
312  
313  
314  
315  
316  
317  
318  
319  
320  
321  
322  
323  
324  
325  
326  
327  
328  
329  
330  
331  
332  
333  
334  
335  
336  
337  
338  
339  
340  
341  
342  
343  
344  
345  
346  
347  
348  
349  
350  
351  
352  
353  
354  
355  
356  
357  
358  
359  
360  
361  
362  
363  
364  
365  
366  
367  
368  
369  
370  
371  
372  
373  
374  
375  
376  
377  
378  
379  
380  
381  
382  
383  
384  
385  
386  
387  
388  
389  
390  
391  
392  
393  
394  
395  
396  
397  
398  
399  
400  
401  
402  
403  
404  
405  
406  
407  
408  
409  
410  
411  
412  
413  
414  
415  
416  
417  
418  
419  
420  
421  
422  
423  
424  
425  
426  
427  
428  
429  
430  
431  
432  
433  
434  
435  
436  
437  
438  
439  
440  
441  
442  
443  
444  
445  
446  
447  
448  
449  
450  
451  
452  
453  
454  
455  
456  
457  
458  
459  
460  
461  
462  
463  
464  
465  
466  
467  
468  
469  
470  
471  
472  
473  
474  
475  
476  
477  
478  
479  
480  
481  
482  
483  
484  
485  
486  
487  
488  
489  
490  
491  
492  
493  
494  
495  
496  
497  
498  
499  
500  
501  
502  
503  
504  
505  
506  
507  
508  
509  
510  
511  
512  
513  
514  
515  
516  
517  
518  
519  
520  
521  
522  
523  
524  
525  
526  
527  
528  
529  
530  
531  
532  
533  
534  
535  
536  
537  
538  
539  
540  
541  
542  
543  
544  
545  
546  
547  
548  
549  
550  
551  
552  
553  
554  
555  
556  
557  
558  
559  
560  
561  
562  
563  
564  
565  
566  
567  
568  
569  
570  
571  
572  
573  
574  
575  
576  
577  
578  
579  
580  
581  
582  
583  
584  
585  
586  
587  
588  
589  
590  
591  
592  
593  
594  
595  
596  
597  
598  
599  
600  
601  
602  
603  
604  
605  
606  
607  
608  
609  
610  
611  
612  
613  
614  
615  
616  
617  
618  
619  
620  
621  
622  
623  
624  
625  
626  
627  
628  
629  
630  
631  
632  
633  
634  
635  
636  
637  
638  
639  
640  
641  
642  
643  
644  
645  
646  
647  
648  
649  
650  
651  
652  
653  
654  
655  
656  
657  
658  
659  
660  
661  
662  
663  
664  
665  
666  
667  
668  
669  
670  
671  
672  
673  
674  
675  
676  
677  
678  
679  
680  
681  
682  
683  
684  
685  
686  
687  
688  
689  
690  
691  
692  
693  
694  
695  
696  
697  
698  
699  
700  
701  
702  
703  
704  
705  
706  
707  
708  
709  
710  
711  
712  
713  
714  
715  
716  
717  
718  
719  
720  
721  
722  
723  
724  
725  
726  
727  
728  
729  
730  
731  
732  
733  
734  
735  
736  
737  
738  
739  
740  
741  
742  
743  
744  
745  
746  
747  
748  
749  
750  
751  
752  
753  
754  
755  
756  
757  
758  
759  
760  
761  
762  
763  
764  
765  
766  
767  
768  
769  
770  
771  
772  
773  
774  
775  
776  
777  
778  
779  
780  
781  
782  
783  
784  
785  
786  
787  
788  
789  
790  
791  
792  
793  
794  
795  
796  
797  
798  
799  
800  
801  
802  
803  
804  
805  
806  
807  
808  
809  
810  
811  
812  
813  
814  
815  
816  
817  
818  
819  
820  
821  
822  
823  
824  
825  
826  
827  
828  
829  
830  
831  
832  
833  
834  
835  
836  
837  
838  
839  
840  
841  
842  
843  
844  
845  
846  
847  
848  
849  
850  
851  
852  
853  
854  
855  
856  
857  
858  
859  
860  
861  
862  
863  
864  
865  
866  
867  
868  
869  
870  
871  
872  
873  
874  
875  
876  
877  
878  
879  
880  
881  
882  
883  
884  
885  
886  
887  
888  
889  
890  
891  
892  
893  
894  
895  
896  
897  
898  
899  
900  
901  
902  
903  
904  
905  
906  
907  
908  
909  
910  
911  
912  
913  
914  
915  
916  
917  
918  
919  
920  
921  
922  
923  
924  
925  
926  
927  
928  
929  
930  
931  
932  
933  
934  
935  
936  
937  
938  
939  
940  
941  
942  
943  
944  
945  
946  
947  
948  
949  
950  
951  
952  
953  
954  
955  
956  
957  
958  
959  
960  
961  
962  
963  
964  
965  
966  
967  
968  
969  
970  
971  
972  
973  
974  
975  
976  
977  
978  
979  
980  
981  
982  
983  
984  
985  
986  
987  
988  
989  
990  
991  
992  
993  
994  
995  
996  
997  
998  
999  
1000

I. INTRODUCTION

Eighteen individual plaintiffs ("Plaintiffs") have brought this action against three bank defendants, U.S. BankCorp, Bank of America, and KeyCorp ("Defendants"), asserting that Defendants wrongfully refused to honor Plaintiffs' bonds, issued between 1980 and 1987. In their amended complaint, Plaintiffs assert five claims: (1) breach of contract, (2) violation of the Washington Consumer Protection Act, (3) conversion, (4) negligence, and (5) restitution for unjust enrichment. Currently before the Court are (1) KeyCorp's Motion to Dismiss all claims on various grounds; and (2) Plaintiff's Motion to Amend Complaint. Having reviewed the pleadings, the

1 record of this case, and the relevant legal authorities, the Court hereby grants the Motion to Amend,  
2 and grants in part and denies in part the Motion to Dismiss, as set forth below.

## 3 II. BACKGROUND

4 The following is a summary of Plaintiffs' factual allegations, which the Court accepts as  
5 true for purposes of this motion. Plaintiffs are owners of bonds that were issued between 1980 and  
6 1987 by Seattle-First National Banks, American Savings Bank of Tacoma, and Rainier National  
7 Banks. Am. Compl. ¶¶ 13–30, Dkt. No. 11-1. Between 1983 and 1992, through multiple mergers  
8 and acquisitions, Bank of America acquired these three banks, including obligations on bonds  
9 issued by these banks. *Id.* ¶¶ 6–12. Sometime after 1992, U.S. BankCorp and KeyCorp each  
10 purchased several Rainier National Bank branches from Bank of America, including deposits and  
11 obligations on bonds issued by those branches. *Id.*

13 Six out of eighteen Plaintiffs, Mihovilich, Weise, Johnson, Miller, Doyon, and Bast, have  
14 asserted claims against KeyCorp. *Id.* ¶¶ 13–29. They are registered owners, or heirs of owners, of  
15 bank bonds or time deposits, all issued by Rainier Bank. *Id.* ¶ 30. According to Plaintiffs, Rainier  
16 Bank, Bank of America, and KeyCorp never notified Plaintiffs that they were not renewing  
17 Plaintiffs' bonds. *Id.* ¶ 34. When Plaintiffs recently attempted to redeem their bonds, KeyCorp  
18 refused to honor the bonds. *Id.* ¶ 42. KeyCorp told Plaintiffs that the bonds were worthless because  
19 the bonds had already been redeemed or escheated to the State of Washington. *Id.* ¶ 43.

21 Plaintiffs filed the original complaint on February 28, 2019. KeyCorp moved to dismiss all  
22 claims on April 1, 2019. Plaintiffs filed a motion for leave to amend their complaint on April 11,  
23 2019. As noted below, the Court grants Plaintiffs leave to amend their complaint, and thus  
24 considers KeyCorp's motion to dismiss as applied to Plaintiff's amended complaint, as requested  
25 by the parties.

### III. LEGAL STANDARDS

A Rule 12(b)(6) motion tests the legal sufficiency of claims asserted in a complaint. To survive such a motion, a plaintiff must plead “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is “facially plausible” when the plaintiff pleads sufficient facts for a court to “draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. In determining whether a complaint “states a plausible claim for relief,” the reviewing court must “draw on its judicial experience and common sense.” *Id.* at 679.

When considering a motion to dismiss, a court must accept all factual allegations pleaded in the complaint as true and draw all reasonable inferences from those allegations in favor of the nonmoving party. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). The court need not, however, accept as true unreasonable inferences or conclusory legal assertions cast in the form of factual allegations. *See Twombly*, 550 U.S. at 553–56.

### IV. DISCUSSION

#### A. Plaintiffs’ Motion to Amend the Complaint

Federal Rule of Civil Procedure 15(a) directs courts to freely give a party leave to amend its pleading when justice so requires. Fed. R. Civ. P. 15(a). A court should give leave to amend “in the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962) (“[O]utright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely

1 abuse of that discretion and inconsistent with the spirit of the Federal Rules.”); *see Howey v. United*  
2 *States*, 481 F.2d 1187, 1190 (9th Cir. 1973) (noting that a court considers several factors such as  
3 undue delay, bad faith, futility of amendment, and prejudice to the opposing party when  
4 determining the propriety of a motion for leave to amend). In determining the propriety of a motion  
5 for leave to amend, the crucial factor is the resulting prejudice to the opposing party. *Howey*, 481  
6 F.2d at 1190 (holding that the trial court’s denial of leave to amend was abuse of discretion even  
7 with five-year delay because there was no showing of prejudice to the opposing party).

8  
9 Here, Plaintiffs filed a motion for leave to amend their complaint just a few weeks after  
10 they filed the original complaint. As discussed more fully below, the amended complaint is not  
11 futile because Plaintiffs clarify their allegations that Defendants assumed liability for the bonds  
12 during the mergers and acquisitions. Am. Compl. ¶¶ 6–11. Moreover, because this case is still in  
13 the early stages and little discovery has taken place, there is no undue prejudice to KeyCorp.  
14 Therefore, the Court grants Plaintiffs leave to amend their complaint. *See Howey*, 481 F.2d at  
15 1190. The Court considers KeyCorp’s motion to dismiss as applied to Plaintiffs’ amended  
16 complaint.  
17

18 **B. The Relevant Statutes of Limitations and Laches Do Not Bar Plaintiffs’ Claims**

19 KeyCorp first moves to dismiss all claims based on the grounds of the statute of limitations  
20 and laches. As discussed below, based on the facts alleged, the Court rejects KeyCorp’s argument  
21 that Plaintiffs’ legal injuries occurred sometime before February 28, 2013 because Plaintiffs knew  
22 or should have known about KeyCorp’s intention not to honor their bonds.  
23

24 The parties do not dispute that the applicable statute of limitations periods are six years for  
25 breach of contract, four years for violation of Washington Consumer Protection Act, and three  
years for negligence, conversion and unjust enrichment claims. *See* RCW 4.16.040(1); RCW

1 19.86.120; RCW 4.16.080(2); RCW 4.16.080. The parties, however, dispute when Plaintiffs'  
2 causes of action began to accrue. Plaintiffs assert that the causes of action accrued only recently  
3 when KeyCorp declined to honor the terms of the bonds and advised Plaintiffs that their bonds had  
4 no value. Pls.' Resp. 9, Dkt. No. 13. KeyCorp contends that the cause of action began to accrue  
5 much earlier because KeyCorp (and other Defendants) did not communicate with Plaintiffs about  
6 their bonds for over 20 years. Mot. Dismiss 9, Dkt. No. 10. KeyCorp argues that lack of  
7 communication for more than 20 years was sufficient to have placed Plaintiffs on notice about its  
8 intention not to honor their bonds. *Id.* KeyCorp does not say when, precisely, Plaintiffs were on  
9 actual or constructive notice, except to imply that it was earlier than February 28, 2013—six years  
10 before Plaintiffs filed their original complaint. *Id.*

12 A cause of action accrues when the party “has the right to apply to a court for relief” and  
13 “can establish each element of the action.” *Deegan v. Windermere Real Estate/Center-Isle, Inc.*,  
14 391 P.3d 582, 591 (Wash. Ct. App. 2017). Generally, this occurs when the plaintiff suffers some  
15 form of injury or damage. *Crisman v. Crisman*, 931 P.2d 163, 165 (Wash. Ct. App. 1997). But the  
16 discovery rule may apply where “injured parties do not, or cannot, know they have been injured.”  
17 *Deegan*, 391 P.3d at 591. Under the discovery rule, “a cause of action accrues when the plaintiff,  
18 through the exercise of due diligence, knew or should have known the basis for the cause of  
19 action.” *Id.*; *see Crisman*, 931 P.2d at 165 (holding that the court may apply the discovery rule as  
20 long as the delay between the injury and the plaintiff’s discovery of it was not caused by the  
21 plaintiff sleeping on his rights). With or without the discovery rule, the defendant asserting a statute  
22 of limitations defense bears the burden of proof. *See Wm. Dickson Co. v. Pierce Cty.*, 116 P.3d  
23 409, 414 (Wash. Ct. App. 2005) (party asserting the time bar bears the burden of proof); *Mayer v.*  
24 *City of Seattle*, 10 P.3d 408, 414 (Wash. Ct. App. 2000) (defendant asserting the time bar did not  
25

1 meet his burden of proof because a genuine issue of material fact existed regarding when the statute  
2 of limitations began to accrue).

3 Here, KeyCorp argues that Plaintiffs' cause of action began to accrue when lack of  
4 communication about their bonds for more than 20 years placed Plaintiffs on notice about  
5 KeyCorp's intention not to honor the bonds. Mot. Dismiss 8–9. Plaintiffs contend that lack of  
6 communication did not necessarily trigger their legal injury because it could also have meant that  
7 their bonds were automatically renewing. Pls.' Resp. 7–9. Plaintiffs argue additionally that in fact  
8 the bank *did* maintain communication with the bond owners but did not notify them that their  
9 bonds were not being renewed. *Id.*

10  
11 The Court finds that Plaintiffs have alleged sufficient facts to support their position that  
12 their legal injuries occurred only recently, that is, when KeyCorp declined to honor their bonds.  
13 Whether lack of communication from KeyCorp about the bonds would have placed Plaintiffs on  
14 notice about their legal injury remains disputed—indeed, as noted above, KeyCorp itself fails to  
15 specify when, in fact, the alleged injuries may have accrued. Therefore, KeyCorp fails to meet its  
16 burden of proving that the relevant statutes of limitations ran before Plaintiffs filed their original  
17 complaint. *See Mayer*, 10 P.3d at 414. KeyCorp's motion to dismiss the claims on the ground of  
18 the statute of limitations is denied.

19  
20 Similarly, KeyCorp fails to meet its burden to establish that laches bars Plaintiffs' claims.  
21 The defendant asserting laches as a defense must prove all three elements: (1) the plaintiff had  
22 knowledge or a reasonable opportunity to discover facts constituting a cause of action; (2) there  
23 was an unreasonable delay by the plaintiff in commencing the action; and (3) there is damage,  
24 prejudice or disadvantage to the defendant, or an innocent third party, resulting from the delay.  
25 *Nettles v. Beckley*, 648 P.2d 508, 510 (Wash. Ct. App. 1982). As previously noted, KeyCorp fails

1 to establish at this stage, by uncontroverted facts, when Plaintiffs knew or should have known  
2 about KeyCorp's intention not to honor their bonds. The Court therefore also declines to dismiss  
3 the claims on the ground of laches.

4 **C. Plaintiffs Sufficiently Allege That KeyCorp Is Liable for Their Bonds**

5 Plaintiffs allege that KeyCorp is liable for their bonds asserting that KeyCorp purchased  
6 several Rainier Bank branches and that the purchase included the obligations on bank bonds and  
7 time deposits issued by those branches. Pls.' Resp. 4–5. KeyCorp argues that Plaintiffs' statements  
8 are merely assumptions or conclusory allegations that are not supported with alleged facts. Mot.  
9 Dismiss 6–7.  
10

11 Under the general rule in Washington, "a corporation purchasing the assets of another  
12 corporation does not, by reason of the purchase of assets, become liable for the debts and liabilities  
13 of the selling corporation." *Hall v. Armstrong Cork, Inc.*, 692 P.2d 787, 789–90 (Wash. 1984).  
14 There are, however, four well-established exceptions to this rule: when (1) the purchaser expressly  
15 or impliedly assumes liability, (2) the purchase is a de facto merger or consolidation, (3) the  
16 purchaser is a mere continuation of the seller, or (4) the transfer of assets is for the fraudulent  
17 purpose of escaping liability. *Id.*  
18

19 Here, Plaintiffs allege that KeyCorp purchased several Rainier Bank branches, including  
20 Rainier Bank's Grays Harbor Branch, Magnolia Branch, University Branch, Goldendale Branch,  
21 and Crown Hill Branch. Am. Compl. ¶ 9. Plaintiffs explicitly allege in their Amended Complaint  
22 that KeyCorp's purchase included the deposits and obligations on bonds issued by those branches.  
23 *Id.* At this stage of the litigation, that is, before discovery has taken place, Plaintiffs are not  
24 expected to produce any evidence to support their allegations. The Court must accept the facts  
25 proffered in the complaint as true and draw reasonable inferences in favor of Plaintiffs. *See Cahill*,

1 80 F.3d at 337–38. Assuming that KeyCorp’s purchase of Rainier Bank’s branches included the  
2 deposits and obligations on Plaintiffs’ bonds, KeyCorp falls under the first exception. Therefore,  
3 the Court rejects KeyCorp’s argument that Plaintiffs have failed to allege that KeyCorp is liable  
4 for the bonds.

5 **D. The Washington Consumer Protection Act Claim**

6 Washington enacted the Consumer Protection Act (“CPA”) “to complement federal law on  
7 restraint of trade, unfair competition, and unfair, fraudulent, and deceptive acts to protect the public  
8 and promote honest competition.” RCW 19.86.920. Plaintiffs assert that KeyCorp violated the  
9 CPA when it told Plaintiffs that their bonds had no value and refused to redeem the bonds without  
10 investigation. Am. Compl. ¶¶ 67–72. KeyCorp moves to dismiss this claim on two distinct  
11 grounds, arguing that: (1) the alleged activities are exempt from the CPA; and (2) Plaintiffs fail to  
12 allege the public interest element that is required to establish a CPA claim. Mot. Dismiss 11–15.

14 **i. The Activities Alleged in This Case Are Not Exempt from the CPA**

15 The CPA does not apply to actions or transactions that are “otherwise permitted, prohibited,  
16 or regulated under laws administered by...any other regulatory body or officer acting under  
17 statutory authority of...the United States[.]” RCW 19.86.170. KeyCorp argues that this exemption  
18 applies to the allegedly unfair business practice in this case because the National Bank Act, 12  
19 U.S.C. § 21 et seq., and the Office of the Comptroller of the Currency (“OCC”) regulate unfair  
20 and deceptive practices by national banks. Mot. Dismiss 11.

22 The Washington Supreme Court, however, has explained that courts should narrowly  
23 construe the scope of the CPA exemptions and liberally construe the CPA to serve its beneficial  
24 purposes. *Vogt v. Seattle-First Nat’l Bank*, 817 P.2d 1364, 1370 (Wash. 1991); *see also* RCW  
25 19.86.920 (“[T]his act shall be liberally construed that its beneficial purposes may be served.”).



1 Courts should not exempt actions or transactions merely because they are regulated generally, and  
2 should apply the exemption “only if the particular practice found to be unfair or deceptive is  
3 *specifically* permitted, prohibited, or regulated.” *Vogt*, 817 P.2d at 1370 (emphasis added) (holding  
4 that “[a]lthough the [OCC] has regulatory and supervisory authority over national banks, that  
5 authority alone does not result in exemption under the [CPA]” for the bank’s allegedly wrongful  
6 conduct; the bank’s conduct of charging unreasonable amount of trustee fees was subject to the  
7 CPA because its practice was not specifically permitted by federal regulation).

8  
9 Here, KeyCorp fails to explain, to the requisite degree of specificity, how the NBA permits  
10 or regulates the alleged practices of misrepresenting the validity of bonds and refusing to redeem  
11 them without investigation. *See Vogt*, 817 P.2d at 1370 (“Exemption under the Consumer  
12 Protection Act is applied only after determining whether the specific action is permitted,  
13 prohibited, regulated or required by a regulatory body or statute.”). Without citation to a specific  
14 provision in the NBA, or OCC regulations, KeyCorp vaguely asserts only that the NBA governs  
15 “allegedly deceptive representations to consumers concerning specific investments.” Def. Reply  
16 7, Dkt. No. 16. Such general averment fails to meet the specificity prescribed by *Vogt*.  
17 Furthermore, KeyCorp’s reliance on *Vatomanyuk v. Quality Loan Service Corporation* is  
18 misplaced. *See* 699 F. Supp. 2d 1242 (W.D. Wash. 2010). In *Vatomanyuk*, this Court found that  
19 plaintiff’s CPA claim was not viable because the NBA regulates the specific practices related to  
20 mortgage lending at issue in that case. *See* 699 F. Supp. 2d at 1246 (citing *Fultz v. World Sav. &*  
21 *Loan Ass’n*, No. C08-0343RSL, 2008 WL 4131512, at \*2 (W.D. Wash. Aug. 18, 2008), in which  
22 the question was whether “the state laws are being used by plaintiffs as a vehicle to impose  
23 limitations on the exercise of national banks’ real estate lending power”). KeyCorp has failed to  
24 point to a similar provision in the NBA—governing the practice of issuing and redeeming bonds,  
25

1 notifying bondholders of the validity or invalidity of those bonds, or any other specific issues in  
2 this case—that would trigger the exemption provision of the CPA.

3 In light of the long-standing and emphatic admonitions to courts to construe the CPA  
4 broadly (and its exceptions narrowly), and in the absence of citation to provisions in the NBA  
5 specifically governing the activities alleged in this case, the Court declines to extend the holding  
6 of *Vatomanyuk*. The activities alleged in this case do not fall under the CPA exemptions at RCW  
7 19.86.170.

8 In a related argument, KeyCorp also argues that the OCC, instead of the Court, should  
9 make the initial decision over the current matter under the doctrine of primary jurisdiction. Mot.  
10 Dismiss 11–12. A court has the discretion to defer to an agency after consideration of the following  
11 three factors:  
12

- 13 1. The administrative agency has the authority to resolve issues that would be referred to  
14 it by the court;
- 15 2. The agency must have special competence over all or some part of the controversy  
16 which renders the agency better able than the court to resolve the issues; and
- 17 3. The claim before the court must involve issues that fall within the scope of a pervasive  
18 regulatory scheme so that the danger exists that judicial action would conflict with the  
regulatory scheme.

19 *Vogt*, 817 P.2d at 1371–72.

20 KeyCorp asserts that the OCC has authority to resolve questions of unfair and deceptive  
21 practices by national banks. Mot. Dismiss 12–13. However, KeyCorp fails to satisfy any of the  
22 three criteria necessary to persuade this Court to defer to the federal agency.<sup>1</sup> No specialized  
23

---

24  
25 <sup>1</sup> KeyCorp relies on *Miller v. U.S. Bank, N.A.*, 865 P.2d 536 (Wash. Ct. App. 1994), in which the court dismissed the CPA claim because the OCC had primary jurisdiction to decide whether the bank's loan collection practices were unfair or deceptive. Mot. Dismiss 12–13. *Miller*, however, can be distinguished from this case. Unlike *Miller*, where the court found that the OCC specifically regulated the relationship between a national bank and its customers

1 knowledge is required to evaluate Plaintiffs' CPA claim. KeyCorp has not explained how the  
2 danger of a conflicting resolution might arise. And while the OCC may indeed have authority to  
3 resolve the issues presented by Plaintiffs' claims, there is no indication whether and how it might  
4 do so. The Court declines to dismiss the CPA claim under the doctrine of primary jurisdiction.

5 **ii. Plaintiffs Sufficiently Allege that KeyCorp's Acts Affect Public Interest**

6 To establish a claim under the CPA, a private plaintiff must establish all five elements: the  
7 defendant's act (1) is unfair or deceptive, (2) occurs in the conduct of trade or commerce,  
8 (3) affects public interest, and (4) causes (5) injury to plaintiff in his business or property.  
9 *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 535 (Wash. 1986).  
10 KeyCorp argues that Plaintiffs' CPA claim fails because Plaintiffs' factual allegations do not  
11 satisfy the third element. Mot. Dismiss 14. KeyCorp asserts that Plaintiffs' allegation that KeyCorp  
12 refused to redeem other similar bonds does not satisfy the public interest element because Plaintiffs  
13 did not indicate the number of potential bond owners who may reside in Washington. Def. Reply  
14 8. Plaintiffs counter that they have satisfied the public interest element. Pls.' Resp. 20. Plaintiffs  
15 allege that KeyCorp's actions affect the public interest because Rainier Bank issued "numerous  
16 similar other bonds to numerous other people" and KeyCorp is refusing to redeem those bonds.  
17 Am. Compl. ¶ 74.

18 To establish the public interest element, a private plaintiff must show that his lawsuit serves  
19 the public interest. *Hangman*, 719 P.2d at 537–39. When determining whether the public has an  
20 interest in an action involving consumer transactions, a court considers the following factors:  
21 (1) were the alleged acts committed in the course of defendant's business? (2) are the acts part of  
22

---

23 concerning bank's loan collection practices, the Court in this case did not find that the OCC specifically regulated  
24 bank's practice of issuing and redeeming bonds. *See* 865 P.2d at 540.  
25

1 a pattern or generalized course of conduct? (3) were repeated acts committed prior to the act  
2 involving plaintiff? (4) is there a real and substantial potential for repetition of defendant's conduct  
3 after the act involving plaintiff? (5) if the act complained of involved a single transaction, were  
4 many consumers affected or likely to be affected by it? *Id.*; see *Travis v. Wash. Horse Breeders*  
5 *Ass'n*, 759 P.2d 418, 423 (Wash. 1988) (holding that the public interest element was met when the  
6 defendants sold a defective racehorse to the plaintiff because the sale was conducted in the course  
7 of business and the defendants' long standing sales practice would likely affect other customers,  
8 jockeys and the betting public).

10 Here, assuming Plaintiffs' allegations are true, all five public interest questions are  
11 answered in the affirmative. KeyCorp, in the course of its business, allegedly refused to redeem  
12 Plaintiffs' bonds without investigation and told Plaintiffs that the bonds had no value. Am. Compl.  
13 ¶¶ 67–68. KeyCorp repeated its practice to at least six Plaintiffs. There is a real and substantial  
14 potential for repetition of its conduct when other bond owners come to redeem similar bonds.  
15 There are “numerous” potential customers who may be affected by KeyCorp's current policy.  
16 Therefore, at this stage, Plaintiffs' allegations satisfy the public interest element and survive a  
17 motion to dismiss. See *Travis*, 759 P.2d at 423.

19 KeyCorp also asserts that Plaintiffs fail to show that KeyCorp's allegedly deceptive act has  
20 the capacity to deceive a “substantial portion” of the public. Mot. Dismiss 14. The Washington  
21 Court of Appeals has recognized that determining whether the deceptive act has the capacity to  
22 deceive a substantial portion of the public is a question of fact. *Behnke v. Ahrens*, 294 P.3d 729,  
23 735–36 (Wash. Ct. App. 2012). Washington courts have declined to determine as a matter of law  
24 what constitutes “substantial portion of the public.” *Id.* Instead, the courts examine whether the  
25 deceptive acts are “unique to the relationship between plaintiff and defendant.” *Id.* Because there

1 is no threshold number as a matter of law and there remains a question of fact whether there are  
2 sufficiently large number of people who may be harmed by KeyCorp's alleged acts, the Court will  
3 not dismiss this claim.

4 **E. The Independent Duty Doctrine Bars Plaintiffs' Negligence Claim**

5 Under the independent duty doctrine, a party cannot recover for a negligence claim that  
6 sounds in a breach of contract. *Steinbock v. Ferry Cty. Pub. Util. Dist. No. 1*, 269 P.3d 275, 281  
7 (Wash. Ct. App. 2011). KeyCorp moves to dismiss Plaintiffs' negligence claim, asserting that it  
8 did not owe Plaintiffs a duty of care independent of its alleged promises contained in the parties'  
9 contracts (i.e. the bonds). Mot. Dismiss 10–11. Plaintiffs counter that they have alleged sufficient  
10 facts to establish that KeyCorp owed them an independent duty of care and that it breached that  
11 duty. Pls.' Resp. 11–12.

13 Specifically, Plaintiffs argue that KeyCorp had a duty to provide Plaintiffs with correct  
14 information about their bonds and that it neglected this duty when it provided Plaintiffs with false  
15 information. *Id.* Plaintiffs assert that their negligence claim survives the independent duty doctrine  
16 because the tort duties were independent from KeyCorp's contractual duty to pay Plaintiffs in  
17 accordance with the terms of the bonds. *Id.*

19 Under the independent duty doctrine, a plaintiff can recover tort damages if the injury  
20 “traces back to the breach of a tort duty arising independently of the terms of the contract.”  
21 *Eastwood v. Horse Harbor Found., Inc.*, 241 P.3d 1256, 1262 (Wash. 2010) (holding that the  
22 plaintiff could recover tort damages when her lessee committed waste on the property because a  
23 tort duty not to commit waste was independent from the contractual obligation to maintain the  
24 property in good condition); *see also Jackowski v. Borchelt*, 278 P.3d 1100, 1109 (Wash. 2012)  
25 (holding that the independent duty doctrine did not bar the plaintiff's claim of negligent

1 misrepresentation, but “only to the extent the duty to not commit negligent misrepresentation is  
2 independent of the contract”).

3 Here, unlike in *Eastwood*, where the defendant had a tort duty not to commit waste outside  
4 of the contractual obligation to maintain the property in good condition, KeyCorp had no duty to  
5 not negligently misrepresent information about the bonds, independent of KeyCorp’s alleged  
6 contractual obligation to honor the terms of the bonds. *See* 241 P.3d at 1262. None of the  
7 allegations in the amended complaint give rise to even a reasonable inference supporting the claim  
8 that KeyCorp had a duty not to commit negligent misrepresentation, independent of the contract  
9 (i.e., the bonds). In fact, Plaintiffs allege that KeyCorp’s common law duties arise from their  
10 contractual relationship—“from the bank’s receipt of funds and the establishment and management  
11 of the account relating to the bonds.” Am. Compl. ¶ 79.  
12

13 Plaintiffs further allege that KeyCorp breached a fiduciary duty by failing to maintain  
14 proper records of the bonds and failing to notify any changes in their accounts. Pls.’ Resp. 11.  
15 Generally, a bank and a customer deal at arm’s length and do not enter into a fiduciary relationship.  
16 *Annechino v. Worthy*, 252 P.3d 415, 417 (Wash. Ct. App. 2011). Special circumstances, however,  
17 may establish the fiduciary relationship between the bank and its customer. *Tokarz v. Frontier*  
18 *Fed. Sav. & Loan Asso*, 656 P.2d 1089, 1092 (Wash. Ct. App. 1982). Some examples of special  
19 circumstances include where: “one who speaks must say enough to prevent his words from  
20 misleading the other party; one who has special knowledge of material facts to which the other  
21 party does not have access may have a duty to disclose these facts to the other party; and one who  
22 stands in a confidential or fiduciary relation to the other party to a transaction must disclose  
23 material facts.” *Id.*  
24  
25

1 Here, Plaintiffs fail to allege that special circumstances existed that would impose a  
2 fiduciary duty on KeyCorp. Because Plaintiffs have failed to allege facts supporting an inference  
3 that KeyCorp owed Plaintiff any tort or fiduciary duty independent of its alleged contractual duty  
4 to honor the terms of the bonds, the Court dismisses Plaintiffs' negligence claim.

5 **F. The Unjust Enrichment Claim**

6 To establish a claim for unjust enrichment, a plaintiff must allege all three elements: (1) a  
7 benefit conferred upon the defendant by the plaintiff, (2) an appreciation by the defendant of the  
8 benefit, and (3) the acceptance or retention by the defendant of the benefit under such  
9 circumstances as to make inequitable for the defendant to retain the benefit without the payment  
10 of its value. *Bailie Commc'ns v. Trend Bus. Sys.*, 810 P.2d 12, 18 (Wash. App. 1991) (citing  
11 Black's Law Dictionary 1535–36 (6th ed. 1990)).

13 Plaintiffs allege that they deposited money with Rainer Bank, and KeyCorp acquired the  
14 deposited money when it purchased several Rainer Bank branches. Pls.' Resp. 21–22. Plaintiffs  
15 assert that KeyCorp benefited from Plaintiffs' money and that fairness and justice require KeyCorp  
16 to return the money to Plaintiffs. *Id.* KeyCorp argues that Plaintiffs fail to allege facts to show that  
17 KeyCorp possessed the money Plaintiffs deposited with Rainier Bank.

19 Unjust enrichment, however, is “the method of recovery for the value of the benefit retained  
20 *absent any contractual relationship* because notions of fairness and justice require it.” *Young v.*  
21 *Young*, 191 P.3d 1258, 1262 (Wash. 2008) (emphasis added). Here, Plaintiffs allege that there exist  
22 express contracts between the parties (i.e., bonds). Because there is alleged contractual relationship  
23 between parties, the Court will dismiss the unjust enrichment claim.

1           **G.       The Independent Duty Doctrine Also Bars Plaintiffs' Conversion Claim**

2           A conversion is “the act of willfully interfering with any chattel, without lawful  
3 justification, whereby any person entitled thereto is deprived of the possession of it.” *Judkins v.*  
4 *Sadler-Mac Neil*, 376 P.2d 837, 838 (Wash. 1962). Plaintiffs allege that they are deprived  
5 possession of their money because KeyCorp refuses to return their money. Pls.’ Resp. 22. KeyCorp  
6 asserts that Plaintiffs fail to state a conversion claim because they deposited their money with  
7 Rainier Bank, and not with KeyCorp.


8           Here, the independent duty doctrine bars Plaintiffs’ conversion claim. As mentioned  
9 previously, under the independent duty doctrine, a party is limited to contract remedies unless there  
10 is an independent tort duty. *Eastwood*, 241 P.3d at 1262 (“When no independent tort duty exists,  
11 tort does not provide a remedy.”); see *Fuji Food Prods., Inc. v. Occidental, LLC*, No. 76152-8-I,  
12 2018 Wash. App. LEXIS 2718, at \*14–15 (Wash. Ct. App. Dec. 3, 2018) (holding that the  
13 independent doctrine barred the conversion claim because the duty not to steal someone else’s  
14 property was related to the contractual duty arising out of the parties’ lease). As discussed above,  
15 Plaintiffs failed to allege that KeyCorp owed them a tort duty independent of its alleged contractual  
16 duty to honor the bonds. Therefore, the Court will dismiss the conversion claim.  
17  
18  
19  
20  
21  
22  
23  
24  
25



V. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS the Plaintiffs' Motion for Amend the Complaint (Dkt. No. 11) and GRANTS in part and DENIES in part KeyCorp's motion to dismiss (Dkt. No. 10). Plaintiffs' claims for negligence, unjust enrichment, and conversion are DISMISSED. The motion as to Plaintiffs' remaining claims is DENIED.

DATED this 25th day of October, 2019.

  
BARBARA J. ROTHSTEIN  
UNITED STATES DISTRICT JUDGE